

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

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In the Matter of:	)	
	)	MB Docket No. 04-232
Retention by Broadcasters of	)	
Program Recordings	)	

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TO: Commission's Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**COMMENT ON NOTICE OF PROPOSED RULEMAKING**

By counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 & 1.419, the Illini Media Company (the "IMC") respectfully submits its comments on the Notice of Proposed Rulemaking, MB Docket No. 04-232 to the Federal Communications Commission (the "Commission"). In this NPRM, the Commission seeks comments regarding the retention of program recordings by broadcasters as a means to enhance its enforcement of the Statute prohibiting indecent and obscene programming, 18 U.S.C. §1464. The NPRM also seeks comments on a myriad of issues stemming from the proposed programming recording including other uses for such recordings in other enforcement proceedings, 1st Amendment concerns, third-party copyright/contractual concerns, the financial and administrative burdens such a requirement would place on broadcasters, specifically small broadcasters, and the general complaint process at the Commission. The IMC respectfully OPPOSES the proposed rule in this NPRM for the reasons set forth below.

### **How to Improve the Complaint Process**

The Commission seeks comments on how to improve the current complaint process. First and foremost, the length of time an individual or entity can bring a complaint for indecent or obscene broadcasts is simply too long, with complaints often brought many months or years after an alleged indecent or obscene broadcast occurred.<sup>1</sup> Simply put, one reason why the Commission lacks better enforcement of its standards is the lack of quick action. If a complainant can wait several months or years before complaining to the Commission, the issues become stale and memories fade. This leads to incomplete information being provided to the Commission. The remedy is simple. Require complainants to file their complaint with the Commission no later than thirty (30) days after the alleged indecent or obscene broadcast. This will ensure that the alleged indecent or obscene broadcast remains fresh in the minds of the complainant and the alleged violator. Second, some complainants use the complaint process to advance their own political or social agendas, rather than focusing on the actual concern, reducing indecent or obscene broadcasts on the airwaves. While there is no quick fix to this problem, one suggestion would be to require complainants to disclose any organizations on whose behalf a complaint is being filed. Finally, the Commission should be required to act on any complaint it receives within sixty (60) days. No longer should the Commission be allowed to sit for months while it reviews the complaint and determines any liability for indecent or obscene broadcasts. If the time for

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<sup>1</sup> See *In the Matter of Complaint Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, File No. EB-03-IH-0407. In that action, the Parents Television Council filed a complaint on August 22, 2003 for indecent and obscene material on a syndicated television program broadcast on November 20, 2001. On August 9, 2004, the Commission found no indecency violations and denied the complaint. See also *In the Matter of Clear Channel Broadcasting Licenses, Inc.*, File No. EB-03-IH-0159. In that action, the alleged violation occurred on April 9, 2003, but the complaint was not filed with the Commission until July 18, 2003.

filing a complaint is not limited or clarified by the Commission, then any recordings retained by broadcasters under the proposed rule would be for naught if complaints are filed months or years after an alleged indecent or obscene broadcast.

Under the current broadcast complaint process, the complainant must submit a tape, transcript, or significant excerpt of the broadcast before the Commission will act on the complaint. Under the proposed rule, broadcasters would be required to retain their broadcasts for 60 to 90 days. If the onus is placed on the broadcasters, then a complainant could just allege a date of an indecent or obscene broadcast. The broadcaster would then have to turn over their recordings of that day, exposing themselves to potential liability for broadcast materials not alleged in any complaint. Furthermore, the Commission would then be obligated to listen to sixteen (16) hours (from 6:00 a.m. to 10:00 p.m.) of taped broadcasting to find any indecent or obscene broadcast materials.

Finally, the Commission makes no specifications for broadcast recording retention with respect to time zone changes. If a complainant listens to a syndicated show in Los Angeles at 8:00 p.m., and the show originates in New York at 11:00 p.m., is the New York broadcaster required to record beyond 10:00 p.m. in its time zone? This is certainly a problem that the Commission faces under its current broadcast complaint process. However, given the expense involved with recording a station's broadcast for sixteen hours, the Commission should clarify any and all time zone issues.

**Whether the Proposed Rule will be Useful in Investigating Other Complaints Related to Program Content**

Given that the IMC holds only a radio broadcast license, it makes no comments on how this new rule could be useful in assisting the Commission in enforcing its

children's television commercial limits.<sup>2</sup> However, the IMC will briefly comment on how this proposed rule affects enforcement of sponsorship identification requirements.<sup>3</sup> Under the Commission's sponsorship identification rules, specifically for political broadcasting, every licensee must keep and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. Since political advertising is heavily regulated, the proposed rule does not add anything to the sponsorship identification enforcement process, except for additional costs to the broadcasters. The same is true for any concerns that the Commission may have with respect to payola and plugola.

**Potential Administrative and Financial Burdens – Especially to Small Broadcasters**

The IMC is a small broadcast licensee, with annual receipts well below \$5 million.<sup>4</sup> Its broadcast unit, WPGU-FM, currently employs three full-time staff members and 12 part-time, paid, student managers, has an independent contract with a radio engineer, and utilizes an IMC accountant to address WPGU-FM's accounting issues. Furthermore, WPGU-FM is currently in market 215, according to Arbitron, Inc.<sup>5</sup>

As far as administrative burdens go, the IMC would surely have to hire another employee, possibly a full-time one, or add to the burdens of its current full-time and part-time staff, to ensure that the broadcast transmission is recorded each day from 6:00 a.m. until 10:00

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<sup>2</sup> 47 C.F.R. §73.670.

<sup>3</sup> 47 C.F.R. §73.1212

<sup>4</sup> The 2004 operating budget for WPGU-FM (an IMC business unit) is \$510,356.

<sup>5</sup> See [http://www.arbitron.com/ad\\_agencies/mm001050.asp](http://www.arbitron.com/ad_agencies/mm001050.asp). Arbitron measures network and local market radio audiences across the United States, which is provided to advertisers to analyze media audience and marketing information data. Arbitron currently lists 287 markets across the United States.

p.m. Also, in whatever electronic format these broadcast days are recorded, sixteen hours worth of material would make for very large files that would certainly need to be split into smaller files. Furthermore, each day would have to be labeled to ensure quick access. WPGU-FM has a limited number of computers: one for its production studio, one for the music log, one for the studio, one for the news and sports staff, and two for the full-time managers. WPGU would have to purchase another computer just to handle the recording of broadcast transmissions, especially since the recording period subsumes the normal business day. If this proposed rule is enacted, the IMC, and its business unit WPGU-FM, would suffer incredible administrative burdens, while never have been the subject of an LOI or an NOL at any time during its licensing. The IMC has been a broadcast licensee since 1967.

The financial burdens on the IMC are astronomical. In order to record sixteen hours of daily broadcast transmissions and store them for 60 to 90 days, the IMC would need to have the storage capacity for 960 to 1,440 hours of recorded audio. Because the current audio recording equipment at WPGU-FM is used for production of station advertisements and promos, the IMC would need to purchase more audio recording equipment just to handle the required recording under the proposed rule. The current prices for audio recording equipment range from \$1,200 to \$3,100.<sup>6</sup> A new, basic computer to handle the recording equipment costs approximately \$700.<sup>7</sup> Finally, server prices for storing the recorded broadcast materials cost between \$1,500 and \$3,100.<sup>8</sup> These are just initial equipment costs for the IMC, whose station's annual budget is approximately \$500,000. It hardly seems fair or appropriate for the Commission to mandate that a licensee that has never been in violation of any of the

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<sup>6</sup> See <http://www.musicianstechcentral.com/recording.html>.

<sup>7</sup> See <http://www.bestbuy.com/site/olspage.jsp?type=product&skuId=6676769&id=1083711060378&cmp=++>.

<sup>8</sup> See <http://h18004.www1.hp.com/products/servers/platforms/index-tc.html>.

Commission's rules expend thousands of dollars and man-hours to record broadcasts that may never be subject to any complaints.

### **First Amendment Issues**

The Commission has asked for comments on whether the proposed rule raises any First Amendment issues, other than the substantive indecency and obscenity standards. This proposed rule has a chilling effect on speech. Under this proposed rule, coupled with the nebulous indecency and obscenity standards of the Commission, broadcasters might be forced to restrict anything broadcast for fear that something recorded for retention might be deemed indecent or obscene ninety days later. Furthermore, by requiring recording and retention of broadcasts, broadcasters would be subject to the whim of complainants, who might fire off complaints to the Commission for political motives. Again, as a result, broadcasters might avoid certain topics of public interest out of fear of potential liability. The Constitution gives significant protection from overbroad laws that "chill speech within the First Amendment's vast and privileged sphere."<sup>9</sup>

The Commission may have noble intentions by proposing this rule; however, the government may not restrict speech, directly or indirectly, because of the possibility that an unlawful act, in this case – indecent or obscene broadcasts, might be committed in the future.<sup>10</sup> This proposed rule places an onerous burden on the free speech rights of broadcasters, which is unacceptable if less restrictive alternatives are available that would be at least as effective in achieving the legitimate purpose of the Commission, preventing

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<sup>9</sup> See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (striking down the Child Pornography Prevention Act of 1996 as overbroad due to its chilling effect on lawful speech).

<sup>10</sup> See *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973).

obscene and indecent broadcasts.<sup>11</sup> As suggested earlier, there is a less restrictive alternative to this proposed rule. The Commission could shorten the time frame in which complainants may file complaints against broadcasters. Furthermore, the Commission could reduce the amount time it takes to act on a complaint. This is certainly less restrictive than requiring over 11,000 radio licensees and over 4,200 television licensees to record and retain sixteen hours of broadcast material each day.

### **Copyright and Contractual Issues**

The copyright owner, under the Copyright Act, has the exclusive right to reproduce the copyrighted work in copies or phonorecords.<sup>12</sup> The IMC's station, WPGU-FM, broadcasts music and syndicated talk shows daily. The copyright owners of the music sound recordings include major record labels, small record labels, and independent artists, while the copyright owners of the talk show programs are other radio stations or production companies. Of course, any words of the station's on-air personalities broadcast by the station are the exclusive copyright of the IMC. While nothing prevents the copyright owner from copying his/her/its own materials, the Copyright Act, as stated above, grants that right exclusively to the copyright owner. By requiring the IMC to record each broadcast day of WPGU-FM, the Commission is asking the IMC to infringe on the rights of hundreds of copyright owners each day.

The Commission may argue that the Copyright Act provides for exemptions to copyright owners' rights. One exemption allows libraries and archives to reproduce one copy

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<sup>11</sup> See *Reno v. ACLU*, 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). See also *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 569-70, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (any suppression of speech ordinarily protected by the First Amendment should be no more extensive than necessary to further the State's interest in a particular area); *Action for Children's Television v. FCC*, 58 F.3d 654 (DC Cir. 1995).

<sup>12</sup> 17 U.S.C. §106.

or phonorecord of a copyrighted work.<sup>13</sup> However, the IMC is neither a library nor an archive, as nothing but the reception area and the public file of WPGU-FM are open to the general public. The fair use exemption exempts from infringement any copy made for criticism, comment, news reporting, teaching, scholarship, or research, depending on the amount of copyrighted material copied.<sup>14</sup> The proposed rule does not relate to any of the fair use exemption purposes, and recording sixteen hours of copyrighted material daily exceeds any rational concept of fair use. Finally, the ephemeral recording exemption<sup>15</sup> does not apply because the proposed rule does not relate to the digital transmission of copyrighted works on a non-subscription basis.

Notwithstanding any copyright issues, the Commission asked for comments on whether the retention of third party commercial materials would raise contractual issues. While the IMC is currently not aware of any potential contractual issues, the IMC reserves the right to comment further on this issue. Furthermore, the IMC defers to other comments from other broadcasters regarding the contractual issue question.

### **Other Comments**

Respectfully, the IMC believes that the Commission focus on more clearly defining indecency and obscenity standard and develop procedures for uniform enforcement, regardless of whether the violator is Howard Stern or Oprah Winfrey or a small broadcaster. This is more important than developing broadcast recording retention policies. The financial burden this proposed rule places on small broadcasters is monumental, which might result in the bankruptcy of many stations in small markets. How ironic that this proposed rule might

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<sup>13</sup> 17 U.S.C. §108.

<sup>14</sup> 17 U.S.C. §107.

<sup>15</sup> 17 U.S.C. §112 – This provision primarily relates to issues raised by and subject to the Digital Millennium Copyright Act of 1998.



thus reduce the number of local stations and crush the Commission's efforts to promote localism in broadcasting.<sup>16</sup>

### **CONCLUSION**

For the foregoing reasons, IMC respectfully opposes the NPRM in Docket No. 04-232. This proposed rule is overly broad and unduly burdensome, infringes on the first amendment rights of broadcasters, may potentially interfere with contractual obligations of broadcasters, may expose broadcasters to copyright infringement liability, and poses a financial and administrative burden on broadcasters, especially smaller broadcasters.

Respectfully submitted,  
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By: 

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<sup>16</sup> MB Docket No. 04-233.